Justifying Justice: Therapeutic Law and the Victimization Defense Strategy

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Abstract:

As cultural sociologists have long held, systems of collective meaning invariably take on concrete institutionalized form. In as much as a therapeutic code of moral understanding has become a dominant impulse in American culture, we would expect to find evidence of this cultural sensibility in society's major institutional structures, including the criminal justice system. In this article, we consider the impact of the therapeutic ethos on criminal adjudication through an examination of the 'victimization defense strategy'—an increasingly popular legal argument that explains criminal action through a focus on past experiences of social victimization. We find that the emergence and application of this legal strategy relies heavily on the therapeutic ethos, a development that both reaffirms the validity of the therapeutic culture and potentially transforms the very essence of the adjudicative process.

KEY WORDS: abuse excuse; criminal defense law; therapeutic culture; therapeutic ethos; victimization defense strategy.

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INTRODUCTION

By now, it is common knowledge that therapy and counseling play an integral role in the criminal justice system. Therapy sessions have been integrated into many prison programs (Eisenman, 1994; Germain, 1996; Homant,1986) and are required by many community supervision programs as well (Gordon et al., 1995; Prendergast et al., 1995). Certainly, this increased reliance on therapy is evidence of the infusion of the therapeutic enterprise into the criminal justice arena. However, such overtly therapeutic practices are only one example of what is a more expansive development in the criminal justice system.

In other words, criminal law has been influenced not only by the emergence of specific therapeutic programs, but by the more widespread penetration of the cultural impulse Philip Rieff (1966) first termed "the triumph of the therapeutic." The increased use of therapy in prisons and supervision programs, therefore, is only the most obvious example of the incorporation of therapeutic sensibilities into criminal law. In this article, we consider the broader impact of the therapeutic ethos on criminal justice by investigating the recent development and use of the "victimization defense strategy," or "abuse excuse" as it is popularly known (Westervelt, 1998). Before turning to the specifics of this new strategy, we first delineate the various features of the therapeutic ethos.

THE THERAPEUTIC ETHOS

In speaking of the therapeutic ethos we do not simply mean the psychoanalytic tradition within the discipline of psychology or specific counseling or treatment enterprises. Instead, we use it here to describe a more wide-spread cultural system or code of moral understanding. As Berger (1965: 38) notes, "psychoanalysis has become a cultural phenomenon, a way of understanding the nature of man and an ordering of human experience on the basis of this understanding." Thus, the therapeutic ethos provides culture with a set of symbols for making sense of the modern world. Based on this understanding, the therapeutic perspective has been variously

described by social scientists and cultural critics as "the psychological society," "the therapeutic culture," "the culture of narcissism," "the shrinking of America," and "the therapeutic attitude."[1]

As depicted in this literature, the therapeutic ethos can be characterized by five defining features, namely, (1) a pronounced cultural preoccupation with the individual self, (2) a notable concern with the place of emotions in making sense of oneself and one's place in the social world, (3) the emergence of a new class of counselors, psychologists, and therapists who have been socially recognized as those most qualified to guide the emotion-laden self through the complexities of modern social life, (4) the reinterpretation of a growing number of behaviors through the pathologically determined heuristic of addiction, disorder, and dysfunction, and (5) the unique cultural salience of the language of victimhood.[2]

Regarding the first, one could argue that the "culture of narcissism," as such, has important historical precedent. The peculiarity of American individualism first analyzed in Tocqueville's classic critique of American democracy and revisited more recently in such works as Bellah et al.'s Habits of the Heart (1985), has been a defining feature of the American experience for a long time. Late 20th-century understandings of the self, however, are qualitatively different from the kind of individualism Tocqueville observed in early nineteenth-century America. More recent conceptions focus on esteeming, actualizing, and realizing the self-evident for example in the extraordinary number of books focused on the topic (e.g., the subject of at least 2,421 books in print)[3] and in the popularity of magazines like Self (which was first published in 1979 and now has a total circulation of over 1,250,000 readers).[4] American individualism, in its contemporary form, departs in important ways from previous forms of individualism. The self-sufficient, rugged individualist represented in the image of the westward driving pioneer of the nineteenth century has been replaced with the more vulnerable, "authentic," inward-looking, and outwardly expressive self of the therapeutic age.

Moreover, the new American individual no longer appeals to the external reference points of once binding moral systems and social institutions but to the less restrained and isolated inner recesses of the self. The self has become the most culturally salient gauge for making moral judgments and for navigating one's way through social life. In Daniel Bell's (1976: xxi) words, the self has become "the touchstone of cultural judgment." Others have variously described this new understanding of the self as the "imperial self," the "saturated self," and "the emotivist self," to name a few.[5] In short, the self has assumed a more central place in the American cultural consciousness.[6]

Closely related to the elevation of the self is the second feature of the therapeutic culture, namely, the dominant form of communication and self-understanding known as the "ethic of emotivism" (MacIntyre, 1984). The emotivist ethic refers to subjectivized understandings of truth based on emotions rather than reason or logic. It is the "dictum that truth is grasped through sentiment or feeling rather than through rational judgment or abstract reasoning" (Bell, 1976:72). The emotivist culture encourages a particular ontology, replacing the Cartesian maxim, "I think therefore I am" with the emotivist, "I feel therefore I am." This emotionally-based understanding of the self shapes the ways in which individuals participate and communicate in social life. The expression of feelings has become the irrefutable trump card, the ultimate appeal that stands impervious to charges of logical inconsistency. In the contemporary context, "All points seem to revolve around the individual's subjective feelings—whether of frustration, anxiety, stress, fulfillment. The citizen recedes; the

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[1] These references can be attributed to the following, in the order noted in the text: Gross (1978), Sykes (1992), Lasch (1978), Zilbergeld (1983), and Bellah *et al.* (1985).

[26]See Nolan (1998), Chapter 1, for an expanded discussion of the various features of the therapeutic ethos.

[3] *Books in Print: 1993-4,* New York: R.R. Bowker Company, was updated to computer listing of Books in Print on Oct. 11, 1994.

[4] From a telephone conversation with Anna Lisa Damley in the research department of *Self* magazine on Oct.14,1994. The total circulation for *Self* in June of 1994 was 1,250,102—724,626 by subscribers and 532,476 off newsstands.

[5] These terms are offered, respectively, by Charles Sykes (1992), Kenneth Gergen (1991), and Alasdair MacIntyre (1984). In addition, Michael Sandel (1983) has called it the "unencumbered self" and Daniel Bell (1973) the "authentic self."

[6] As Philip Rieff puts it, "The self, improved, is the ultimate concern of modern culture" (1966: 62).

therapeutic self prevails" (Elshtain, 1986:92).[7] This is not to say that all Americans or even a majority of Americans appeal primarily to their emotions to determine how they should function within society. It is to say, though, that social conditions increasingly militate against other forms of moral referencing and self-understanding.

The third feature of the therapeutic ethos in American culture is the rise of a new priestly class of psychologists and psychiatrists who have been given the social status and cultural authority to make sense of the complex emotions emanating from the authoritative self. Replacing the priests, pastors, and rabbis of the old, religiously grounded moral order are the psychiatrists and psychologists of the therapeutic ethic. The therapist in the contemporary context has assumed "the role of a 'secular spiritual guide"' (Rieff,1966:249).

Bernie Zilbergeld (1983), Ellen Herman (1995) and others (Rice, 1996; Lasch,1977) have documented the growth of this new "priestly" class revealing the substantial aggregate influence of psychology on contemporary society. For example, America has more psychiatrists than anywhere else in the world. In 1983, there were an estimated 90,000 licensed psychiatrists in the entire world; a third of whom were in America (Zilbergeld, 1983).[8] Between 1965 and 1981, the number of doctorates conferred annually in psychology more than tripled while the number conferred in all fields only doubled (Hunter and Ainley,1986). In 1986, there were 133 more Ph.D.'s in psychology than in all the other American social sciences combined. Likewise, in 1993, more bachelor degrees were awarded in psychology than in all other social science fields, and in most other natural science disciplines as well.[9] Membership in the American Psychological Association grew from 2,739 in 1940 to 30,839 in 1970 to over 75,000 in 1993 (Herman, 1995).

That a growing number of individuals need this new form of "salvation" is fostered by the recent increase in the number of behaviors viewed within the medical model. Actions that were once interpreted as being good or bad, moral or immoral, right or wrong, are now interpreted on the basis of health or sickness. Behaviors once understood through a religious frame of reference are now viewed in terms of health, which of course makes more essential the role of therapeutic practitioners. In other words, the role of the new priest depends in part on the redefinition of human behaviors in pathological rather than moralistic categories.

The fourth defining feature of the therapeutic ethos, then, is the growing tendency to define a range of human behaviors as diseases, disorders, or pathologies. Within the therapeutic enterprise, the therapist is, of course, concerned with healing or curing the afflicted patient. As the therapeutic perspective has spilled into the culture more broadly, so has the belief that a growing number of human actions represent diseases or illnesses that need to be healed. "The psychiatrist," as Christopher Lasch (1977:98) observes, "has translated 'everything human' into 'mental terms of illness'." That many Americans have accepted this pathological redefinition of behavior is evident on several fronts.

One important carrier of this mindset is the popular self-help group format of Alcoholics Anonymous (AA). Widespread involvement in AA and related treatment modalities has helped to foster the now common view that alcoholism and drug use are illnesses that require therapeutic treatment for recovery. A 1987 Gallup poll reported, for example, that 90 percent of Americans believe alcoholism is a disease (Peele,1989:46). But AA provided only the first step in a longer process of reinterpreting many more behaviors as diseases. Other self-help groups based on the AA model—such as Alateen (AA for teenagers), NA (Narcotics Anonymous) and PA (Parents Anonymous, groups of parents struggling with abusive behavior toward children)— have grown up around the country. Also following AA's lead are the codependency groups like Codependents Anonymous (CoDa), Adult Children of Alcoholics (ACOA), and Al-Anon (for spouses of alcoholics), groups whose

[7] Also see Hunter's *Before the Shooting Begins* (1993), where he finds sentimental or emotivist discourse to be a dominant element of public debates over the controversial abortion issue.

[8] Also consider John Rice's discussion of the "therapeutic foundation" on pp. 27–31 in "A Disease of One's Own: Psychotherapy, Addiction, and the Emergence of 'Co-Dependency','' a dissertation presented at the University of Virginia, May 1992.

[9] Only computer science and biology edged out psychology, but not by very much. See Herman (1995:3).

members' identities are based on their dysfunctional or codependent relationships with alcoholic family members.[10]

14Rice (1992) in "A Disease of One's Own" makes the important observation that since the mid 1980s the disease view has become the predominant understanding of codependent group participants. Rice also observes how many of the behaviors of those functioning within the relational universe of alcoholics have been reinterpreted in pathological terms. For example, such diagnostic labels as the Hero, the Enabler, the Mascot, the Lost Child, the Martyr, and the Scapegoat, are syndrome labels used to describe the symptomatic responses of individuals to an alcoholic friend or family member.

Today, self-help groups are available for any number of habitual behaviors. For example, recovery groups have grown up for gamblers, overeaters, compulsive shoppers, smokers, those involved in compulsive sexual behaviors, and sufferers of agoraphobia (fear of open places) (Rice, 1996). Other self-help groups include Debtors Anonymous, Workaholics Anonymous, Dual Disorders Anonymous, Batterers Anonymous, Victims Anonymous, and Unwed Parents Anonymous, to name only a few (Sykes, 1992).

In addition to the disease labels of those involved in self-help groups, a number of other behaviors have been reinterpreted as illnesses. One indicator of this is the list of disorders in the Diagnostic and Statistical Manual of Mental Disorders, Third Edition, Revised (DSM 777-R), the mental health classification system published by the American Psychiatric Association. The DSM 777-R is "widely accepted in the United States as the common language of mental health clinicians and researchers" (DSM 777-R, 1987:xviii). A survey of diagnostic experts in 55 countries found that 72% of them used this classification system (Larson, 1988). In the DSM 777-R and the more recently published DSM 7V, a whole range of social behaviors have been reclassified in pathological terms, among them Attention Deficit/Hyperactivity Disorder, Pathological Gambling, and Intermittent Explosive Disorder (the loss of control of one's aggressive impulses resulting in violence).[11]

This, of course, is not to say that everyone is sick or that everyone understands himself or herself to be sick. Certainly, some find the pathological reclassifications found in the DSM 7V and elsewhere to be a bit excessive. What is important to recognize, however, is that it is increasingly acceptable, on a cultural level, to understand oneself and to speak of oneself according to these categories.

Appeals to these reference points are often subtle. Consider, for example, the way in which Americans offer pathological interpretations of a range of social behaviors. It is not unusual to hear of someone who is obsessive compulsive, or who is in denial, or who has repressed things from the past, suffers from low self-esteem, is acting out, has an inferiority complex, is going through a mid-life crisis, or comes from a dysfunctional family. As Stanton Peele (1989:54) contends, "no other nation has taken the implications of disease theories of behavior as far as the United States or applied the disease model to as many new areas of behavior."

The concern about whether one is happy and healthy now challenges in importance whether one is good or bad or even right or wrong. While it is possible that behaviors themselves have changed in some instances, the more dominant transformation has been in the cultural definitions of these behaviors. The way Americans view alcoholism and other behaviors is a reflection of our cultural values, of the reigning zeitgeist. We are victims of our beliefs, just as those in the past are victims of theirs (Fingarette, 1988:15). To call Americans victims of

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[11] For a recent popular review of the expanded number of disorders included in the *DSM* see Sheila Rothman's "More of what avails you: The boom in psychiatric syndromes," *The Washington Post*, April 13, 1997, C1.

their beliefs is particularly appropriate in the contemporary context where the victim mindset increasingly has become part of the way we understand ourselves and our relationships with others.[12]

The victimized mentality is the final defining feature of the therapeutic ethos and is closely related to the central place of the self and the growing cultural proclivity to interpret behavior in pathological terms. The self is not the perpetrator of a disorder, but the victim. Implicit in the very definition of a disease is the belief that it is not the individual's fault, but that someone or something else is to blame. As Stan Katz and Aimee Liu, authors of The Codependency Conspiracy (1991), explain, "The diseased person is cast as a victim of the infectious agent, a person who is powerless over his or her disease and has no responsibility for its onset." Just as an AIDS patient is a victim of the HIV virus, so too are those within the self-help culture victims of their codependent relationships. This, anyway, is how leaders in the movement portray things (see, for example, Beattie, 1987).

This is not to say that most individuals on the level of individual consciousness necessarily think of themselves in this way, though the cultural climate may encourage cognitive understandings of oneself to move in this direction. Again, the important point here is that the language of victimhood is increasingly visible in American culture, which makes appeals to it more likely, in spite of one's cognitive disposition. In sum, as Robert Hughes (1993:9) observes, "The all-pervasive claim to victimhood tops off America's long-cherished culture of therapeutics."

The Cultural Impact of the Therapeutic Ethic

Thus, the therapeutic ethos—with the pathologies of the victimized, emotivist self-interpreted for us by the practitioners of the therapeutic vocations—has become a dominant theme in contemporary American society. However, as has been the case historically, prevailing cultural impulses do not remain exclusively within culture, but invariably influence society's social structures (Schudson, 1989; Berger and Luckmann, 1966; Garland, 1990). No less has this been the case with the therapeutic ethos. This ethic has had a significant impact upon a number of realms of the American state, including the military (Herman, 1995), education (Kramer, 1991), welfare policy (Polsky, 1991), civil law and political debate (Nolan, 1998). Here, we focus more specifically on its expansion into the legal arena in the form of a new criminal defense strategy, the "victimization defense strategy."[13] That is, we look at the way in which a new form of jurisprudential defense is being employed in American law and examine the extent to which it relies on the defining characteristics of the therapeutic ethos.

Beginning with Emile Durkheim, social scientists have long recognized the important functional and symbolic role that crime and punishment play in clarifying the moral boundaries of a given society. Through the process of punishment, a particular society's moral sentiments are highlighted, underscored, or reclassified. The law, then, is of primary significance to society because it establishes, to a great extent, the "rules" by which people live and the circumstances under which they will be punished for wrongdoing (as well as defining "wrongdoing" itself). The criminal law is of particular importance because it represents the community's voice regarding which behaviors are right and wrong, acceptable and unacceptable, legitimate and illegitimate (Dressler, 1987). Stated simply, the law, in particular the criminal law, is "one way of declaring what is morally right and wrong" (Macaulay et al., 1995:5).

Thus, changes in legal processes are significant on a number of fronts and can be taken as indicative of larger cultural changes in moral understanding. The law, understood in this way, is a window to the particular culture within which it finds itself (Geertz, 1983; Glendon, 1987, 1989). As David Garland (1990:21) argues of criminal justice practices, "Punishment ... is necessarily grounded in wider patterns of knowing, feeling, and acting, and it depends upon these social roots and supports for its continuing legitimacy and operation." This view of law's dependency upon culture runs counter to the "basic bent of orthodox legal scholars" who

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[12] The *Wall Street Journal* (1994) reported, for example, that "America is engulfed by a wave of disorder-seeking and blame-shifting.... It is somebody else's or some other thing's fault when individuals are messed up...."

[13] See Westervelt (1998) for a detailed analysis of the legal and sociological development of this new defense strategy.

maintain a belief in the relative autonomy of the law (Friedman, 1994:28). We do not wish to argue that the law is simply the codified reflection of dominant social forces. Such a crude cultural determinism would be just as misguided as a blind belief in the impenetrable autonomy of the law. Rather, we hold that the law is influenced by cultural sensibilities just as it, in turn, influences culture.

In other words, culture exists in a dialectical relationship with criminal law. As the culture impacts and gives meaning to the law, so the law directs, informs, and instructs culture. "The broad patterns of cultural meaning undoubtedly influence the forms of punishment. But it is also the case that punishments and penal institutions help shape the overarching culture." In short, "it is a two-way process" (Garland, 1990:249). This article focuses primarily on the first part of the dialectical relationship, that is, on culture's influence on law, and in particular the influence of the therapeutic ethic on one dimension of American criminal jurisprudence.

Before turning to a fuller consideration of this relationship, it is important to disabuse readers of a common misperception regarding the infusion of therapeutic proclivities into American law. It is commonly assumed that to be therapeutic in orientation is to be soft on crime. Typical, for example, is the distinction Donald Black makes between "penal" and "therapeutic" styles of social control. The former, according to Black, is an accusatory style of social control where the goal is punishment, and where the hostile conflict between parties results in a clear winner and a clear loser. The therapeutic, in contrast, is a remedial style of social control where the goal is social repair and normality, and where the victim gets "help" rather than "punishment" to improve his or her condition. According to Black, each style has its own logic, its own language, its own way of defining and treating deviant behavior (Black, 1976:4–5).

Though this classificatory scheme may be helpful for certain conceptual exercises, it overlooks the highly coercive qualities of some therapeutic forms of social control, a matter given considerable attention over the past several decades (Foucault, 1979; Szasz, 1963, 1984; Polsky, 1991; Chriss, 1999). Contemporary developments in the criminal justice system like the burgeoning drug court movement, therapeutic communities in prisons, and boot camps make readily apparent that the conventional categories of punitive vs. therapeutic, conservative vs. liberal, coercive vs. liberating, tough vs. rehabilitative are at best not very helpful (Nolan, 1998). Represented in these adjudicative and penal practices is the conflation of these conventionally disparate tendencies.

Indeed, programs defined as "therapeutic" can have very "tough" consequences. Consider the harshest and most punitive of all forms of punishment: the death penalty. Even here, states that had previously abandoned capital punishment reinstituted it, in part, because it could be justified in accordance with therapeutic sensibilities. "The offender, who is strapped upon a stretcher trolley like a patient awaiting an operation, is put to death anonymously, under the guise of a medical procedure.... The use of 'therapeutic' drugs and medicalized procedures is thus an attempt to generate an acceptably 'modern' mode of execution" (Garland, 1990:245).

It is not very useful, therefore, to view the "therapeutic" and the "punitive" as mutually exclusive or contradictory forms of legal social control. Therapeutic justice can be both punitive and therapeutic at the same time. In fact, survey data reveal that in the public mind these two tendencies are not at all incompatible. A 1996 national survey asked respondents to rank the importance of various approaches to the crime problem. Eighty five percent of Americans identified "more treatment and education" as important in solving the crime problem. Ranking not far behind, however, were "harsher sentences" (81%) and "more police" (75%).[14] Americans thus are just as enthusiastic about therapeutic treatment as they are more conspicuously "tough" approaches to law enforcement. Apparently, these are not viewed as incongruous approaches.

Therapeutic justice, thus, is sometimes mischaracterized by making too wide a distinction between therapeutic and punitive forms of social control, and by overlooking the manner in which these two dispositions can

[14] 1996 Survey of American Political Culture, University of Virginia. Percentages represent those who answered "important" or "very important" to the question.

function in a rather complementary fashion. Another misconception of therapeutic justice errs in the opposite direction. That is, it is sometimes assumed that recent styles of therapeutic justice are not altogether different from certain premodern forms of social control. As a consequence, the important novelty of late twentieth century therapeutic justice is underemphasized.

Consider, for example, the work of John Sutton who argues that the foundations for therapeutic law can be traced as far back as the criminal justice practices of seventeenth century New England. The law had not yet progressed along the Weberian continuum toward a more rationalized system of jurisprudence. Judges at that time had a great deal of discretion. Available to them were a wide range of sanction options that could be variously assigned in response to the individual's particular situation. These included wearing a visible sign of guilt, for example, a scarlet letter, spending time in the stocks, even "brandings and mutilations" (Sutton, 1988:70). Importantly, however, judicial discretion was exercised in accordance with "the degree of repentance shown by the offender" (Sutton, 1988:70). Given this level of judicial flexibility, Sutton concludes that the Puritans had "developed, in an elementary way, a therapeutic system of justice" (Sutton, 1988:70).

But judicial leniency based upon "repentance" and judicial sanctions employing public shamed-based punishments are profoundly unlike judicial discretion and forms of punishment (or "treatment") based upon a therapeutic worldview. Sutton himself writes that "the modern notion of rehabilitation is a secularized version of the Calvinist view of redemption" (Sutton, 1988:64). But this is the critical point. The secularization and rationalization processes that characterized the reform movements of the nineteenth and early twentieth centuries made increasingly untenable a Calvinistic interpretation of individual behavior—the system of meaning that shaped and defined early American jurisprudence. A contemporary therapeutic lens of interpretation may offer the judge or jury greater judicial discretion, but it is based on a system of meaning that is fundamentally contrary—indeed, as Rieff and Lasch have persuasively argued, antithetical—to traditional religion. In this sense, then, the therapeutic is of a clearly singular quality. Even Sutton recognizes that the contemporary therapeutic ethic understands the self in a fundamentally divergent way. He also concedes that "such a view of the individual legitimizes highly invasive strategies of manipulation" (Sutton, 1988:79).

Therefore, late twentieth century therapeutic justice may be a more pronounced realization of a style of jurisprudence the roots of which can be traced as far back as the colonial period. However, the ideological contours of the therapeutic ethic, as described by Philip Rieff and others since the 1960's, is substantively distinct from its ostensible origins. In the Weberian sense, modern rationalism has destroyed its religious roots. And though the cultural emergence of the therapeutic in this important social institution may indeed bean effort to re-enchant the world, it does not return to the ideals and forms that defined the premodern period. Mandating someone to involuntary treatment in order to help build self-esteem or acquitting someone for murder because of her victimized condition is qualitatively different from sending someone to the stocks or imposing a more lenient sanction because of publicly demonstrated contrition. The phenomenon as depicted here, even if it may be the logical end of a process set in motion over two centuries ago, is a fundamentally distinct social reality, the substance and consequences of which invite careful description and analysis.

Toward this end, we now turn to an examination of the infusion of the therapeutic ethos into the legal arena, focusing on the development of a new criminal defense strategy as an example of the broader process by which the therapeutic ethos has begun to inform, influence, and justify American criminal law. As a strategy that was first successfully formulated and used in the late 1970's and early 1980's, the victimization defense strategy is uniquely situated to incorporate the defining characteristics of this now dominant cultural perspective.

The Therapeutic Ethos and Criminal Defense Law

The Victimization Defense Strategy: Definition and Development

Seizing the national spotlight in January of 1994, the victimization defense strategy was brought to the public's attention in the Menendez and Bobbitt cases. The first trial of Eric and Lyle Menendez, prosecuted for the shooting deaths of their parents, ended in hung juries after defense attorneys argued that both sons were victims

of physical and sexual abuse and had killed their abusive parents in self-defense.[15] Lorena Bobbitt was acquitted by reason of insanity of the malicious wounding of her abusive husband John after arguing that she too was a victim of abuse who had struck back at her abuser while consumed by an "irresistible impulse." The cases shared a common premise: the defendants were not offenders but victims whose actions directly resulted from their victimization and should, therefore, be excused.

Alan Dershowitz (1994) labeled this defense argument the "abuse excuse." In the swirl of attention and controversy generated by these cases, many legal scholars and social critics readily offered their opinions as to the appropriateness of such a legal strategy (a question beyond the scope of the present analysis). Yet, no scholars provided an examination of the structure or development of the strategy or any empirical data on its use over time. Such an examination, however, usefully informs debates about the strategy (and, in fact, eventually revealed that neither the Menendez nor Bobbitt cases were representative of the typical use of this strategy). It also reveals the extent of the influence of the therapeutic ethos on this part of the criminal justice system.

The abuse excuse, or "victimization defense strategy" as it is called here, is a new method of legal argument that focuses on repeated past experiences of social victimization to explain and excuse a defendant's criminal actions .[16] "Social victimization" refers to instances in which an individual has been injured as a result of social relations or conditions, such as in cases of physical abuse, discrimination, social deprivation, and neglect. Thus, biologically and psychologically rooted conditions such as premenstrual syndrome, hyperglycemia, and schizophrenia are not included as forms of social victimization. The victimization defense strategy, then, is used by defendants who seek to reconstruct themselves as victims of abuse, discrimination, or deprivation and use that victim status as a way to elicit a favorable judicial disposition.[17]

While the victimization defense strategy is not a new defense in and of itself, it is a new strategy used within the context of existing defenses such as insanity and self-defense.[18] This approach is a new, accepted method of argument used by defense attorneys to win acquittals based on insanity, self- defense, or even duress. Consider the case of Eloise Shields, a battered woman charged with the murder of her common-law husband (see Bochnak, 1981 for a more detailed account of this case). Here, the defense used the strategy to support a self-defense argument. Shields claimed that she had been physically abused—victimized—by her husband for years, including earlier on the night of the homicide. Because of this past social victimization, she believed that she was in danger of being abused again and possibly even killed when her partner returned home from his drinking binge on the night of the incident. In other words, her actions were the result of a belief that was directly produced by past social victimization. Thus, her defense strategy was to argue that she was a victim and that this victimization was not her fault. As a result, the actions produced by the victimization (her attack on her husband) were also not her fault: she, therefore, should be excused from responsibility for those actions. The victimization defense strategy was the approach the defense used to support Shields' contention of self-defense.

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[15] They actually argued for "imperfect self-defense," which is not a complete defense. A successful use of this defense does not result in a full acquittal of murder charges, but rather a conviction for the lesser charge of manslaughter (Dressler, 1987). Both brothers were convicted of first degree murder in their second trial; however, testimony regarding the alleged abuse they suffered was severely limited by the judge. Thus, the full defense presented in the first trial was restricted in the second.

[16] See Westervelt (1998) for an in-depth discussion of the definition and structure of this strategy.

[17] Many social critics have noted a similar trend in society in general, i.e., the use of one's status as a victim to excuse one from responsibility for misconduct or irresponsibility. These critics have labeled this cultural tendency as the "culture of victimization" and argue that its entrenchment portends the demise of personal responsibility in America. See Hughes (1993), Kaminer (1995), Steele (1990), and Sykes (1992) for this argument. Westervelt (1998) provides a more balanced examination of the relationship between victimization (especially within the context of the criminal law) and responsibility.

[18] This is not to say that such an argument has never been used before by defense attorneys. However, only recently has the strategy been methodically formulated into a formal argument that can be used in a variety of cases that share certain features and characteristics. Whereas it may have been used randomly in individual cases in the past, it is now one of the primary strategies considered in certain types of cases, such as cases of battered women or children who strike back at their abusers. The following are examples of appellate recognition of the appropriate use of the victimization defense strategy in such cases: *State v. Kelly*, 97 N.J.178; 478 A.2d 364 (1984) [battered woman]; *State v. Allery*,101 Wash.2d 591, 682 P.2d 312 (1984) [battered woman]; *Rogers v. State*, 616 So.2d 1098 (1993) [battered woman]; *State v. Janes*,121 Wash.2d 220, 850 P.2d 495 (1993) [battered child].

This strategy can be broken down into four main components, again using the Shields case as a point of illustration. First, the defense emphasizes social relationships and conditions in a defendant's past, rather than focusing exclusively on the immediate behavior of a defendant (and others) at the actual time of the crime. Second, the defense seeks to establish a pattern of suffering by the defendant and/or abusive behavior endured by the defendant over time. This requires the defense to present evidence of past abuse or deprivation. Shields incorporated both of these elements into her defense; she sought to introduce testimony about the past behavior of her husband, his reputation for violence, and his repeated abuse of her over the years. In several pretrial briefs, Shields' defense team summarized their reliance on these two components of the strategy as follows:

> We have here a situation where the deceased indulged in heavy drinking both in the past and on the night in question, we have here a situation where the deceased frequently and repeatedly beat the defendant when under the influence of alcohol, and those beatings became more and more frequent and more intense as the relationship evolved. The jury must decide whether or not the defendant acted reasonably under the circumstances. Those circumstances are not limited solely to November 26, 1977, but to the totality of the circumstances which led up to the slaying of Sidney Watson.... [T]he prior acts of the victim represent a progression of increasing violence toward the defendant, and where defendant's response on the night in question was based upon the cumulative effect of this violence at the hands of the victim.... proof of prior acts of violence by the victim which would naturally create apprehension in the defendant is of the utmost relevance (all quotations regarding this case are taken directly from legal memoranda for the Shields case cited in Bochnak, 1981:227, 230).

The third component of the defense is the presentation of expert testimony, usually in the form of a psychological or psychiatric diagnosis, about the psychological impact of this past victimization on the defendant's behavior and state of mind. The defendant is often diagnosed as suffering from some syndrome or disorder that has directly resulted from the social victimization. In Shields' case, she offered expert testimony that she suffered from battered woman syndrome as a result of the past abuse.

Finally, the defense actively attempts to reconstruct the identity of the defendant from "offender" to "victim," often explicitly referring to the defendant as a victim. Shields' defense team employed this fourth component of the strategy when they argued that the testimony about past abuse made it clear "who was the true assailant and who was the true victim," insinuating that Shields was in fact the victim and her husband the true offender (Bochnak, 1981:230).

These components place the defendant's behavior within the context of her entire life experience, allowing the defense to tell the defendant's story from her own perspective. For example, Shields recounted a history of injustice and suffering, and psychologists and other experts explained how those experiences shaped her perspective and behavior. Ultimately, she argued that her actions were borne out of early injustice and suffering and should be excused or justified.

In order to examine the initial development and eventual institutionalization of the victimization defense strategy, we relied on a number of data sources. Our primary source was state appellate court decisions, while we also used secondary source materials, such as law review articles and legal memoranda, to find applicable appellate cases and to help us understand the legal arguments in these cases.

For the most part, appellate cases are initiated when the defense disagrees with a procedural ruling issued in the original trial and then requests that a higher court review that ruling. We choose to focus on appellate cases, rather than trial cases, for a number of reasons. First, appellate cases are available for systematic review. A certain number of state decisions are published every year in the regional reporters and are thus more easily accessible and suitable for systematic analysis. Trial court decisions are not similarly available for research purposes and can only be obtained from the clerks of court of each jurisdiction within each state.

Second, and more importantly, state appellate decisions establish law for that state. Whereas the primary goal of trial courts is to establish the facts of a case and determine guilt or innocence, the primary goal of appellate courts is to establish law, to determine the rules that structure the activities of the trial courts. Lawyers cite appellate cases, not trial cases, to support their arguments; judges base their rulings on previous appellate court

decisions. If appellate courts rule that the victimization defense strategy is a legitimate way to argue a case of self-defense (or duress, or insanity), that acceptance indicates approval of that strategy by the state and determines that trial courts must also accept the use of that strategy. We, therefore, rely primarily on appellate court acceptance as our primary measure of the successful institutionalization of the victimization defense strategy.

When examining appellate cases, we searched for cases in which the defense relied on a strategy that incorporated the four components of the victimization defense strategy outlined above: an emphasis on social relationships and conditions in the defendant's past, evidence establishing a pattern of abuse suffered by the defendant over time, expert testimony about the psychological impact of this past social victimization on the defendant, and attempts to reconstruct the identity of the defendant into a "victim." In turn, we coded these cases for the following: the legal arguments used by both sides, the final case disposition, the social characteristics of the defendant and victim, the type of social victimization claimed by the defendant, and the source of that victimization.

The analysis of state appellate cases revealed that the victimization defense strategy was first accepted as a legitimate legal strategy in cases resembling that of Eloise Shields—battered women's self-defense cases in which women argued that their past experiences of domestic abuse explained why they assaulted or killed their abusers (usually their husbands or lovers) in self-defense (Bochnak,1981). In such cases, the defense focuses on the history of the woman's relationship with her abuser, rather than on a description of the events immediately surrounding the incident in question. In addition, the defense provides evidence regarding past occasions of abuse inflicted on the woman by her abuser, thus presenting the first two elements of the victimization defense strategy. Expert psychological testimony, often in the form of testimony about battered woman syndrome, is offered to explain how the woman's experiences of past victimization shaped her present interpretation of her abuser's behavior, making her believe that she was in imminent danger of death or serious injury at his hands. And, lastly, throughout the trial, the defense reemphasizes that the woman is the true victim in such cases: the victim of an abusive spouse or lover, the victim of an ineffective criminal justice system, and/or the victim of an inattentive society. Since her actions resulted from this victimization, she should not be held responsible for them. Thus, all four elements of the strategy are used to explain why her past victimization should explain and justify her present actions.

The first state appellate acceptance of the victimization defense strategy as a new legal strategy came in 1979 in Ibn-Tamas v. United States.[19] Here, the defense had attempted to offer the victimization defense strategy to support a self-defense claim by a woman who had killed her abusive spouse. At trial, several elements of the victimization defense strategy were not allowed to be presented. On appeal, the court reversed these findings and remanded the case back to the trial court for reconsideration of admittance of these elements. This case was heard by the appellate court in the District of Columbia. Twenty-three other state courts have heard similar cases in which the trial court disallowed elements of the victimization defense strategy in support of a battered woman's self-defense argument, decisions that were overturned on appeal. In these twenty-three states, the appellate courts indicated that trial courts should allow the entire victimization defense strategy to argue a battered woman's self-defense case.[20]

An additional nine states heard cases in which the victimization defense strategy had been allowed by the trial court in battering cases.[21] These cases were appealed on other grounds, not directly on issues related to the

[19] 407 A.2d 626 (1979), reversed and remanded, 455 A.2d 893 (1983), aff'd.

[20] The twenty-three states that have accepted the use of the victimization defense strategy through appellate court decisions are: Alabama, California, Delaware, Florida, Georgia, Illinois, Kansas, Kentucky, Maine, Massachusetts, Michigan, New Jersey, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Washington, and Wisconsin. Some illustrative cases are: *Smith v. State*, 247 Ga. 612, 277 S.E.2d 678 (1981), on remand, 159 Ga.App.183, 283 S.E.2d 98 (1981); *State v. Kelly*, 97 N.J. 178, 478 A.2d 364 (1984); *Commonwealth v. Stonehouse*, 555 A.2d 772 (Penn. 1989); *People v. Humphrey*, 921 P.2d 1 (Cal. 1996).

[21] Colorado, Iowa, Maryland, Minnesota, Missouri, Montana, Rhode Island, South Dakota, and Wyoming.

acceptance of the strategy; however, in each case, the appellate court again indicated its acceptance of the strategy. In only five states has the use of the victimization defense strategy in battered women's self-defense cases been rejected by the appellate courts outright.[22] Appellate courts in the remaining thirteen states have not had to rule on the issue.

We must also add that five states have passed legislative statutes recognizing the premises behind the battered woman's self-defense argument— Maryland, Massachusetts, Missouri, Ohio, and Wyoming. Section 10-916 of the Maryland code is emblematic of these statutes:

> ... when the defendant raises the issue that the defendant was, at the time of the alleged offense, suffering from the Battered Spouse Syndrome as a result of the past course of conduct of the individual who is the victim of the crime for which the defendant has been charged, the court may admit for the purpose of explaining the defendant's motive or state of mind, or both, at the time of the commission of the alleged offense: 1) evidence of repeated physical and psychological abuse of the defendant perpetrated by an individual who is the victim of a crime for which the defendant has been charged; and 2) expert testimony on the Battered Spouse Syndrome.

In addition, California passed a policy by which the Board of Prisons must provide, on a yearly basis, the names of women suffering from battered woman's syndrome who are currently in prison and who may be recommended for early release. Finally, by 1992 Congress had passed a resolution stating that "expert testimony concerning the nature and effect of domestic violence, including descriptions of the experiences of battered women, should be admissible when offered in a state court by a defendant in a criminal case" (reported in Lefcourt, 1995:18.46). Again, these statutes indicate acceptance of the four components of the victimization defense strategy, as used in this type of situation.

Thus, since the late 1970's and through the 1980's and 1990's, state courts have recognized the legitimacy of the victimization defense strategy. It has become an institutionalized part of the legal landscape. This is not to say that all battered women accused of homicide or assault use this strategy, much less successfully. As is true of most cases in our court system, a large percentage of these cases are plea-bargained before ever reaching trial or result in conviction after a trial. A recent report by the Bureau of Justice Statistics (Langan and Dawson,1995) reveals that 43% of all spouse murder defendants do plead guilty, with male and female defendants equally likely to plea (53% of women, 57% of men). Interestingly, however, of those defendants who do choose to go to trial, 27% of the female defendants are acquitted. No male defendants were acquitted. Langan and Dawson contend that this higher percentage of acquittals for females is likely due to the fact that they are more likely to be acting in self-defense. These women can now avail themselves of a defense strategy wholly unavailable to them twenty years ago.

It is also important to note that although accepted most often in the battered woman context, the victimization defense strategy has been granted legitimacy by some state appellate courts when used in a variety of other types of cases as well (Westervelt, 1998). In fact, the use of the strategy has expanded in two different areas. First, this defense approach has been extended to men and children, thus expanding the type of defendant who can use it to his or her benefit.[23] Second, the strategy has now been accepted in cases other than the typical "battered spouse" case, thus extending to a variety of different types of relationships. Cases involving parents and children and siblings have been accepted, as well as cases in which the defendant and victim are merely non-intimate acquaintances and even strangers.[24] Interestingly, in each of these expansion cases, the court justifies the application of the strategy on the grounds that it has been accepted by appellate courts in battered women's cases. Thus, over the past twenty years, the victimization defense strategy has been established as an

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[22] Indiana, Louisiana, Mississippi, North Carolina, and West Virginia.

[23] *Commonwealth v. Kacsmar*, 421 Pa.Super. 64, 617 A.2d 725 (1992) [battered man kills abusive brother]; *State v. Janes*, 121 Wash.2d 220, 850 P.2d 495 (1993) [battered child kills abusive father].

[24] *Commonwealth v. Kacsmar*, 421 Pa.Super. 64, 617 A.2d 725 (1992) [battered man kills abusive brother]; *State v. Williams*, 787 S.W.2d 308 (1990) [battered woman kills innocent acquaintance—Missouri]; *People v. Romero*, 10 Cal.App.4th 1150,13 Cal.Rptr.2d 332 (1992), *rev. granted* 17 Cal.Rptr.2d 120, 846 P.2d 702 (1993) [battered woman robs strangers while under duress].

accepted legal defense argument, a newly institutionalized and sometimes successful "story" available to defendants in the courtroom.[25]

The Therapeutic Ethos as Defense Strategy

As used in court, this strategy embodies, to a greater or lesser degree, each of the five features previously identified as comprising the core of the therapeutic ethos. We will note the links between each below, using actual cases as points of illustration. In so doing we will demonstrate that the advent of the victimization defense strategy was given meaning and direction by the justificatory presence of the therapeutic culture. The therapeutic ethos, then, can be added to the important effect of the women's movement to explain the emergence of this historically unique legal defense strategy. As the latter has been considered fully elsewhere (Westervelt, 1998), we turn now to the concomitant influence of the therapeutic ethos.

First, as discussed earlier, the therapeutic ethos takes the self as the center of moral authority. Less binding are externally derived standards against which individual actions are measured and judged. Instead, the self is viewed as the ultimate arbiter of values and behavior. The victimization defense strategy also takes the self as the primary reference point. The goal of the strategy is to deny the labels placed on the defendant from outside sources (labels such as "offender" and "perpetrator," "murderer" and "assailant") and, instead, to tell the defendant's story from her own perspective .[26] The strategy provides information about the life history of the defendant, the experiences that have shaped her beliefs and behaviors. The defense contends that the jury cannot understand and judge the defendant's behavior without first viewing it from the defendant's own perspective. The defense hopes that the jury will find the defendant's actions to be reasonable, or at least excusable, when understood from her own point of view, rather than when judged according to some external standard of behavior.

Take again, for example, the case of Eloise Shields (Bochnak, 1981). Earlier during the night of the incident, Shields' husband had been physically abusing her. She argued that this was a common occurrence and was often accompanied by threats of further abuse and even death, especially when he had been drinking heavily. On the night of the shooting, she claimed that he returned home in a drunken state. Based on his past behavior, she feared for her life and knew that her only mechanism for defense, given his greater size and strength, was the use of a weapon, resulting in his death.[27]

In order to be acquitted in self-defense, the jury must believe that Shields reasonably believed herself to be in imminent danger of serious injury or death and, therefore, used proportional force in defending herself (Dressler, 1987). This standard requires that the jury understand Shields' "state of mind" at the time of the incident and judge her based on her "personal knowledge of the [husband's] pattern of behavior when he indulged in heavy drinking" (Bochnak, 1981:228). In other words, the jury must try to understand the defendant's actions from her own perspective, a perspective shaped by past abusive experiences with her husband.

To some extent, this is an attack on the "reasonable man standard" traditionally applied in self-defense cases. According to this traditional adjudicative standard, jurors consider the following: Would a reasonable man of average size and strength be justified in using such extreme force in this situation? As such, the basis of

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[25] Some legal scholars disagree, arguing that the increased use and success of the "abuse excuse" is a media creation. According to these scholars, the strategy is merely a last-ditch effort by defense attorneys and is of no consequence to the legal system. See Bonnie (1995), Slade (1994). However, this argument understates the success and significance of this strategy within the legal arena. We contend that this is not only an accepted new method for arguing "abuse" cases, but is the primary method of argument. In fact, one appellate court reversed the conviction of a battered woman who had killed her abuser on the basis that her trial counsel did *not* offer this strategy in her defense. In essence, the appellate court established, as a matter of law, that the victimization defense strategy was the primary method of arguing such cases. See *Commonwealth v. Stonehouse*, 555 A.2d 772 (1989).

[26] We use the pronoun "her" throughout the following discussion because the typical defendant using the strategy is a female. This is not to deny that several males have used the approach successfully as well.

[27] Some researchers argue that women are more likely to "strike back" in nonconfrontational situations, such as when the abuser is asleep (Bochnak, 1981; Ewing, 1987; Rosen, 1986). However, others disagree, claiming that most battered women kill their abusers during an actual confrontation, better approximating the traditional self-defense situation (Maguigan, 1991).

consideration is a singular standard applied in all self-defense cases that does not take into account the internal processes of the "victim." Implicitly, Shields' defense strategy was to question the adequacy of this standard when judging her behavior. Was Shields a man of average size and strength who could successfully counter the blows of another man? Obviously not, she contended. Thus, this singular criterion was insufficient. Instead, she argued that to understand the "reasonableness" of her behavior, one must view the situation from her perspective. This case reflects a more general trend in which courts are further "subjectivizing" this standard by imbuing it with the characteristics of individual defendants (Dressler,1987). As the court states in State v. Leidholm,[28] "accused's actions are to be viewed from the standpoint of a person whose mental and physical characteristics are like the accused's and who sees what the accused sees and knows what the accused knows" (quoted in Dressler, 1987:202-203).

Thus, the woman's own understanding of her actions becomes the focus of the strategy and trial, not the standard imposed by the court.[29] In this way, the victimization defense strategy emphasizes personal perspective over more objectively determined measurements for what constitutes criminal behavior. The "perspectivalist" self becomes the most valid source of information.

Closely related to the centrality of the self in the therapeutic ethos is the emphasis on feelings. Within the therapeutic culture, expressing one's feelings is a cherished value, while denying the legitimacy of someone's feelings is the ultimate sin. The victimization defense strategy includes this element of the therapeutic ethos as well. Reconstructing the identity of the defendant into that of "victim" requires the defense to focus on the feelings of the defendant—the pain, shame, embarrassment, and self-doubt experienced by the defendant as a result of past social victimization. As one feminist scholar states about the use of the victimization defense strategy in battered women's cases, the judge and jury must understand the "accumulated feelings of rage and fear that come from being a victim of abuse over a long period of time" (Bochnak, 1981:68). The validity of these feelings is central to the defendant's victim status and can determine whether the judge and jury will view the defendant sympathetically.

Thus, Shields, for example, must explain how her husband's physical and psychological abuse "intimidated her into fearing for her life [and] .. . created a fear that could not be dispelled or eradicated, a fear which escalated over time and which culminated in a life or death situation" (Bochnak,

[28] 334 N.W.2d 811, 818 (1983)—a battered woman self-defense case.

[29] See *State v. Wanrow* [88 Wash.2d 221, 559 P.2d 548 (1977)] for the first appellate case to recognize the inadequacy of the "reasonable man standard" for female defendants. Many courts now make reference to a "reasonable person standard" that takes into consideration the specific physical traits of the defendant claiming self-defense (Dressler, 1987; Gillespie, 1989). In addition, courts recognize that testimony regarding a history of abuse is important to understand why a woman perceives herself to be in imminent danger [*Commonwealth v. Stonehouse*, 555 A.2d 772 (1989)].

Table I. Decade When States First Admitted Psychologists as Expert Witnesses[a]

1940's	1950's	1960's	1970's	1980's
Michigan	Connecticut	Missouri	Georgia	Arkansas
Minnesota	New Jersey	D.C.	Rhode Island	Maine
	New York	Oklahoma	Massachusetts	Nebraska
	Texas	California	Colorado	Delaware
	Ohio	Virginia	Indiana	Kansas
	New Mexico	Louisiana	Pennsylvania	Montana
		Florida	Alaska	Nevada
		Illinois	Arizona	New Hampshire
		Maryland	South Dakota	North Carolina
		Oregon	Tennessee	South Carolina
			West Virginia	Alabama
			Kentucky	Idaho
			Mississippi	Vermont
				Wyoming
				North Dakota
				Hawaii
				Utah

[a]From Nolan, *The Therapeutic State*: *Justifying Government at Century End* (1998:69).

1981:228). In State v. Kelly,[30] another battered woman case that relied on the victimization defense strategy, an expert testified that Mrs. Kelly suffered from "frustration; stress disorders; depression; economic and emotional dependence on her husband; ... poor self image; isolation, and learned helplessness." In State v. Hundley,[31] a similar battered woman case, the defense presented the following testimony about battered women like the accused: "the abuse is so severe, for so long a time and threat of bodily harm so constant, it creates a standard mental attitude in its victims. Battered women are terror-stricken people whose mental state ... bears a marked resemblance to that of a hostage ora prisoner of war .... They live inconstant fear." As one expert testified in State v. Janes,[32] the first battered child case to use the victimization defense strategy successfully, Andrew Janes endured "an unremitting pattern of episodic terror" at the hands of his abusive stepfather. To explain, and possibly excuse, the defendant's actions, the defense focuses on the defendant's emotions and state of mind at the time of the incident, thus providing legitimacy for the claim of victimization.

A third element of the therapeutic is the increasing importance of psychologists and psychiatrists in American society. With socially conferred expert status, these professionals are those deemed best able to understand human actions and encourage self-fulfillment in a complex modern world. As psychologists have increased in number and influence in our society over the past thirty years, they have also become more accepted and influential in the courtroom. Table I above indicates the decades in which the fifty states and the District of Columbia first accepted psychologists as expert witnesses. Today, expert testimony by psychologists and psychiatrists is commonplace (Kroll-Smith and Jenkins, 1996).

Analysis of the cases when state's first accepted the expertise of psychologists reveals that the growing status of psychology in America's increasingly therapeutic culture served as an important justificatory force behind this development. For example, when an Oregon court first allowed a psychologist to testify as an expert witness, it did so based upon the rationale that "clinical psychology has become established and recognized as a profession whose members possess special expertise ... ," In this case the court observed that the "[c]ourts ... have lagged in recognizing the expertise of an evolving profession,"[33] a condition it sought to remedy by allowing the psychologist into the courtroom. Based on similar reasoning, an Illinois court first allowed the expert psychologist to occupy the witness stand because of the "increasing recognition of psychology's contributions to an understanding of human behavior."[34]

[30] 102 Wash.2d 188, 192, 685 P.2d 564,567 (1984).
[31] 236 Kan. 461, 467, 693 P.2d 475, 479 (1985)
[32] 121 Wash.2d 220, 221, 850 P.2d 495, 496 (1993).
[33] *Sandow u. Weyerhaeuser Co.*, 449 P.2d 429 (Oregon, 1969).
[34] *People u. Noble*, 42 Ill. 487, 248 N.E.2d 96 (Illinois, 1969).

In some instances legal recognition of the expertise of the psychologist followed passage of state licensing codes for psychologists, which itself is a fairly recent phenomenon. In 1946 Connecticut was the first state to pass legislation for the licensing of psychologists. In 1977 Missouri became the fiftieth state to enact such legislation. Language contained in these statutes suggests that the legal passage of licensing codes was also spurred by psychology's elevated status in society generally. This is evident, for example, in Florida's law regulating psychology, which states: "The Legislature finds that as society becomes increasingly complex, emotional survival is equal in importance to physical survival." Since psychology assists the public "primarily with emotional survival," then "the practice of psychology" should be licensed and regulated by the state.[35]

Subsequently, the role of the psychological expert has become increasingly important in both civil and criminal law. This is certainly the case in the legal use of the victimization defense strategy, where expert psychological testimony is a primary and necessary component of the overall strategy. Psychologists and psychiatrists are essential to explain the "cumulative effects" of past social victimization on the behavior and state of mind of the defendant (Walker, 1984; see also Cipparone,1987; Rosen, 1986). These individuals are the recognized experts qualified in the science of the mind and, therefore, are best prepared to interpret the impact of past victimization on an individual's perceptions and beliefs. Thus, psychologists are uniquely situated to explain why, for example, a battered woman reasonably perceives herself to be in imminent danger when being confronted by an abuser, as again in the case of Eloise Shields. In their argument for the admission of expert psychological testimony, Shields' attorneys claimed: "testimony of an expert on the psychological framework of a battered woman is essential to the jury's determination of the primary issue in this case: that is, did the defendant act reasonably under the circumstances which resulted in the death of Sidney Watson?" (Bochnak, 1981:231–232). Similarly, in Commonwealth v. Kacsmar,[36] the first accepted use of the victimization defense strategy in a battered male case, the defense argued for a reversal of a trial court decision that had disallowed expert psychiatric testimony that Kacsmar was the victim of abuse at the hands of his brother. The defense contended that such testimony was essential for the court to understand that the accused "was the victim of psychological and physical abuse inflicted by his brother,"[37] and that this abuse shaped his perceptions. The appellate court reversed the trial court exclusion, admitted the testimony, and remanded the case for retrial.

Finally, in one remarkable battered woman case, the appellate court actually reprimanded the defendant's trial counsel for not offering expert psychological testimony at the original trial, stating, "trial counsel was ineffective, and the absence of such expert testimony was prejudicial to appellant."[38] The appellate court overturned the trial court's conviction based on the use of ineffective counsel by the accused woman and remanded the case for retrial, strongly recommending that the new defense counsel make use of expert psychological testimony on behalf of his client. As the "new priestly class" of the therapeutic age, the psychologist confers a degree of legitimacy on the defense strategy and defendant, explaining that the defendant's perceptions and emotions are understandable given her past experiences.

As the number of psychologists has grown, so has the American tendency to pathologize or medicalize behavior. Just as medical doctors assume expertise over biological dysfunction and interpret behavior within that framework, psychologists assume expertise over psychological dysfunction and interpret behavior within that framework. It should not be surprising, then, that as psychologists have become increasingly prominent in our society, their view of behavior has also gained acceptance.

In many cases, this disease model of social behavior is a primary focus of the victimization defense strategy. The expert testimony offered by the psychologists is often, though not always, in the form of a diagnosis. Experts explain that because of past social victimization, the defendant suffers from battered woman syndrome,

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[35] Laws of Florida, Chapter 81–235: 490.002.
[36] 617 A.2d 725 (1992).
[37] *Id.* at 730.
[38] *Commonwealth v. Stonehouse*, 555 A.2d 772, 785 (1989)—emphasis added.

battered child syndrome, urban survival syndrome, or posttraumatic stress disorder (to name just a few).[39] For example, Eloise Shields sought to offer expert testimony that she suffered from battered woman syndrome in order to explain why she remained in the abusive relationship and how the past abuse shaped her perceptions. In a separate case, a psychologist testified that a young teen killed another youth because she suffered from an "urban psychosis," a mental illness that was caused by growing up in a violence-ridden inner city (Flaherty, 1995; Falk, 1996).[40] In his self-defense case, Andrew Janes fought for the admission of testimony that he suffered from battered child syndrome ... and won .[41] Such diagnoses place the defendant's behavior within the disease model: his or her actions are interpreted as resulting from a disorder. As such, the defense argues that these actions are thus justifiable. Responsibility should be mitigated or fully suspended. The pathologization of behavior, then, often plays a key role in the successful use of the victimization defense strategy.

The tendency to view behavior as a sickness is particularly relevant in regard to a criminal defense strategy because of the relationship between the disease model and individual responsibility. Our legal system dictates that individuals are held responsible for behavior that is freely chosen, i.e., a result of free will (Dressler, 1987). Yet, sickness and disease are states over which people have no control. Therefore, actions resulting from disease are attributed to the power of the disease, rather than free will. Some argue that such behavior deserves treatment rather than punishment. The individual should not be held accountable for such behaviors that are beyond his or her control. Thus, interpreting behavior from within the disease model can directly affect an individual's level of criminal accountability, as seen by its successful use within the context of this defense approach.

Finally, and most obviously, the fifth component of the therapeutic ethos—victimization—is central to this defense strategy. Each of the elements of the strategy—the focus on past abuse and/or suffering, the use of psychologists to explain the impact of the past on the defendant, the pathologization of behavior—emphasizes the status of the defendant as a "victim"—a victim of a bad relationship or difficult childhood, a victim of abuse, a victim of a disorder. The central goal and a primary element of the strategy is to reconstruct the identity of the defendant from "offender" to "victim." Elizabeth Schneider (1986:199) sums up the central goal of the use of the victimization defense strategy in battered women's self- defense cases as follows: "... to explain the woman's action as reasonable. The woman's experience as a battered woman and her inability to leave the relationship—her victimization—is the context in which that action occurs." As Eloise Shields' defense team states, it is essential that they establish Shields as a "victim" of abuse and battered woman syndrome and clarify for the court "who was the true assailant and who was the true victim" (Bochnak, 1981:230). Similarly, the defense and court describe the defendant in Stonehouse[42] as a "victim of psychological and physical abuse," and Andrew Janes,[43] the court states, could "readily be identified as a victim."

By using the victimization defense strategy, the defendant tells a story of victimization, a story which millions of Americans are also telling about their own lives (Hughes, 1993; Sykes, 1992). Victimization implies innocence and inspires sympathy (Magnet, 1995; Steele, 1990). People are usually the victims of someone or something else: they are not the cause of their own victimization. If one is not responsible for the cause of her victimization, she is also not responsible for the consequences of it. The victimization defense strategy capitalizes on this cultural tendency. By redefining the defendant as a victim, the defense hopes to call into question its client's culpability.

DISCUSSION

[39] *Commonwealth v. Stonehouse*, 555 A.2d 772 (1989) [battered woman syndrome]; *State v. Janes*, 121 Wash.2d 220, 850 P.2d 495 (1993) [battered child syndrome]; Milloy (1994) [urban survival syndrome]; *State v. Morgan*, 536 N.W.2d 425 (1995) [urban psychosis and posttraumatic stress disorder].
[40] See the case of *State v. Morgan*, 536 N.W.2d 425 (1995).
[41] 121 Wash.2d 220, 850 P.2d 495 (1993).
[42] 555 A.2d 772, 783 (1989).
[43] *State u. Janes*, 121 Wash.2d 220, 221, 850 P.2d 495, 496 (1993).

Thus, the victimization defense strategy fully incorporates the basic features of the therapeutic ethos, providing evidence for the infusion of this cultural tendency into one arena of the criminal justice system. Though this defense approach is not successful in every case (few, if any, defense strategies are), it has been accepted by appellate courts as a new method of arguing certain types of cases, most particularly cases involving battering and abuse. In fact, some legal scholars would argue that it is the primary method for arguing these types of cases, the first approach considered by defense attorneys. As determined in Commonwealth v. Stonehouse,[44] a defense attorney can now be reprimanded as "ineffective counsel" for his or her failure to employ this strategy in battered women's self-defense cases. Given this, we contend that the victimization defense strategy has successfully appropriated the culturally dominant therapeutic ethos as the basis for a justifiable criminal defense strategy.

This is, of course, a highly significant development. The law, particularly the criminal law, both reflects and determines community standards regarding acceptable behavior and the conditions under which individuals will be held accountable for unacceptable behavior. For example, the criminal law establishes that we hold people responsible for misconduct unless they are insane, under duress, or particularly young. These standards apply both to criminal defendants and to society at large. To a great extent, these are the rules we use for determining responsibility both inside and outside of the courtroom. Changing these "conditions for responsibility" has both practical and symbolic importance.

In essence, acceptance of the victimization defense strategy adds "victimization" to the list of conditions that we can use to explain and excuse certain behaviors. Victims facing possible legal sanctions can alleviate their criminal responsibility by availing themselves of this defense strategy.[45] In this example, then, the therapeutic ethic is used as a tool to challenge, and in some cases excuse, the culpability of a defendant in a criminal case. It is used to further subjectify the criminal justice process. By placing the self at the center of the defense, the victimization defense strategy asks judges, juries, prosecutors to examine the situation from the unique perspective of the defendant, a perspective marred by abuse, by victimization. This defense asks those judging the defendant's behavior to "walk a mile in his shoes." When used to support a battered woman's self-defense argument, this defense approach serves to recognize the woman's unique point of view on her actions. However, the defense strategy opens the door to the acknowledgment of other perspectives as well.

> In other words, [if] the jury must consider the woman's perspective when judging her actions ... [then] the jury must also take into account the child's perspective when judging his actions, or the inner-city youth's perspective when judging hers. As a result, the subjectification of the law paves the way for the expansion of the strategy to more and more defendants seeking to explain their actions from their own points of view... (Westervelt 1998:146).

Thus, when used in this way, the therapeutic ethic provides a way for the criminal justice system to incorporate multiple perspectives of victimization into the adjudicatory process.

It would be a mistake, however, to conclude that this is the only manner in which the therapeutic sensibility informs criminal or civil law. As argued in the first part of the article, therapeutic law can also be used as a source of knowledge-power, to borrow Foucault's term, that justifies the sometimes coercive application of state authority. So which is it? Is it a new justification for state authority or an ideology that excuses individual responsibility? We contend that it can be both. Given that the therapeutic ethos is a prevailing cultural sensibility, it makes sense that it would be appealed to by all actors in legal conflicts. In many legal disputes, this is precisely what occurs.

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[44] 555 A.2d 772 (1989).

[45] This should not be interpreted, however, as a wholesale vindication of all victims. Not all "victims" can use this strategy to their benefit: there are limits. For example, the strategy is most successful when used by people who have suffered identifiable physical abuse, and least successful for those suffering more abstract forms of abuse (social deprivation, war-induced trauma, urban psychosis). See Westervelt (1998).

Consider, for example, a case in East Lansing, Michigan, where the parents of a third-grade boy sued the school district after their son, Jason, was sent to a counselor—over the forceful objections of the father.[46] This case then is a prima facie example of therapeutically inspired coercive action by a state-sponsored institution. Interesting, however, were the legal grounds upon which the parents made their case. In Newkirk v. Fink, Jason's parents allege that "Jason suffered panic attacks and separation-anxiety disorder as a result of psychological tests used in the counseling" (Walsh, 1996). Notice that the objections also appeal to therapeutic terms, the same idiom upon which the counselor's authority is based. Both the victimizer and the victimized, as it were, are speaking the same language. They are appealing to the same system of meaning.

That the therapeutic sensibility can be used in both directions in this way challenges sociological assessments of the law as commonly understood within Foucaulian and Marxist inspired critiques. The therapeutic may well be a dominant ideology, but it is one that cuts both ways. This is not to suggest that the therapeutic is a neutral ideological system. The legal adoption of dominant cultural meaning systems are never neutral. They always carry with them defining codes of moral understanding that substantively shape and determine legal theory and practice. Perhaps the more significant consequence of the penetration of the therapeutic ethos into America's criminal courts—represented in the adoption of the victimization defense strategy and otherwise—isn't so much which individual or group profits most from its use, but rather how the very meaning and substance of criminal adjudication is transformed in the process.

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[46] For news accounts of these various cases see Peter J. Shelly and Eleanor Chute, "Does Parental Control Stop at School House Door?" *Pittsburgh Post Gazette*, February 10, 1998; Walter F. Naedele, "Spin on Girls' Physicals Stirs National Tumult," *Philadelphia Inquirer*, May 15, 1996, p. B1; Arnold F. Fege, "Parental Rights: Yes! Parental Rights Legislation: No!" *Educational Leadership*, November 1997, p. 79; and Mark Walsh, "Parent-Rights Cases Against Schools Fail to Make Inroads" *Education Week*, April 10, 1996, p. 11.

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